IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1456

MELVIN LEMMONS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on December 24, 1975 and Petition for rehearing with suggestion for a rehearing en banc being denied February 13, 1976.

CITATIONS OF OPINIONS BELOW

The opinion of the District Court finding Petitioner Guilty and sentencing him to ten (10) years imprisonment under Title 18, Section 4208 (a) (2) U.S.C. May 31, 1974. Decision of the Court of Appeals affirming the judgment of the trial court December 24, 1975. Denial

of Petition for Rehearing with suggestion for rehearing en banc February 13, 1976.

JURISDICTION

The Order of the Court of Appeals was entered February 13, 1976. The jurisdiction of this court is invoked under Title 28, Section 1254 (1) U.S.C.

STATEMENT OF QUESTIONS INVOLVED

1. Whether police officials may discriminatorily make selective arrests of citizens, without probable cause, who merely have a proprietary interest in property where contraband is found?

2. Whether the district court may foreclose legitimate pretrial discovery, which denies the defendant's 6th Amendment right to the effective assistance of counsel on the defense proffered?

3. Whether the district judge, sitting as the trier of fact, may include in his deliberation of an accused's guilt or innocence, evidence and other facts not a part of the trial record?

4. Whether an accused's Sixth Amendment guarantee of confrontation and cross examination outweighs the right of the government to present evidence from business records that is outcome determinative?

STATEMENT OF THE CASE

Petitioner and a female were arrested January 22, 1973 while Federal and local officers were executing a search warrant at 9300 WOODWARD AVENUE, Detroit, Michigan, which had been issued by a Federal Magistrate

January 16, 1973. During the search, contraband was allegedly found at 9304 WOODWARD AVENUE, which was the Northside of the business operating at 9300 WOODWARD AVENUE.

As a result of the finding of the contraband, petitioner and the female arrested were charged in a one count indictment with violating Title 21, Section 841 (a) (1) U.S.C.

Pre-arraignment on the indictment, petitioner filed a Motion to Suppress Evidence, Withhold Evidence from Consideration by Grand Jury, to Allow Discovery and Disclosure of Informant. The magistrate assumed jurisdiction of the Motion and denied same ex parte.

Pretrial, several discovery motions were filed by the petitioner. All of said motions were denied. However, a full hearing was conducted on the Petitioner's Motion to Suppress the evidence.

EVIDENTIARY HEARING

DEA Agents acting on information from an alleged informant secured a search warrant for 9300 WOODWARD AVENUE, Detroit, Michigan, the first floor and basement area. The premises to be searched was a men's clothing store.

Six days later, agents raided the premises. Upon their arrival, the store was occupied by the Manager, Alice Marie Jones, five (5) store employees and several customers. All persons on the premises were required by the agents to congregate in an area at the front of the store while the search was being conducted, and were not free to leave that area without permission.

Ten or more minutes after the search of the premises began, Petitioner LEMMONS appeared at the front door of the store and requested entry. He was advised to leave. He informed the agents that he had a proprietary interest in the business and wanted to know the nature of the trouble. Petitioner was admitted inside and immediately arrested and strip searched.

Contraband was subsequently found in a file cabinet, which was situated on the Northside of the store (9304 WOODWARD), accessible to anyone entering that area. Said evidence was not shown to nor inventoried in the presence of Petitioner LEMMONS or the Store Manager Alice Jones. The business' attorney appeared at the premises, and his request to know what was found and where it was found was refused. An inventory of articles seized was conducted some hours later, at the Federal Building, but not even in the presence of persons named on the return.

The Affiant for the Search Warrant had been working with the informant concerning the questioned premises since December 15, 1972. However, one day before, the agents took pictures of a different building (December 14, 1972) in connection with the same investigation. Although the premises to be searched was under surveillance some thirteen (13) times, no unusual activity was observed in and around the premises which would tend to corroborate the informant's information. Moreover, Petioner LEMMONS was never seen in or around the premises to be searched and his existence was unknown to the agents, because the informant allegedly dealt only with a female, on the premises, who gave her name as "Carol Jones".

The evidence showed that Petitioner Lemmons was one

of several stockholders in the corporation that owned the clothing store and he had no position which would require him to spend any appreciable time there. However, Alice Jones was a stockholder of the corporation and a salaried manager, and was seated at the desk next to the file cabinet where the contraband was allegedly found at the time the officers came to conduct the raid.

After finding the contraband, the agent in charge made a decision to charge Petitioner LEMMONS and the Store Manager, Alice Jones. All other persons were released. The government conceded that the sole reason for Petitioner LEMMONS' arrest was that he appeared at the store while they were there, expressed a proprietary interest in the business, and wanted to know what the trouble was.

The district judge denied defense motions to suppress the evidence, as well as motions for discovery, disclosure of the informant, inspection, in camera conference with the informant, disclosure of witnesses not known to the defense, production of Grand Jury minutes, dismissal for lack of speedy trial and dismissal against Petitioner LEMMONS.

TRIAL TESTIMONY

The only evidence the government ever presented to establish Petitioner LEMMONS' connection with the business was his alleged expression before he was permitted to enter, that he had a proprietary interest in the business.

The essential evidence against the Petitioner LEMMONS at trial was testimony from an officer of the Michigan State Scientific Laboratory that his (LEMMONS') fingerprints matched two prints that were on lifts in their office file.

The testimony disclosed, that after LEMMONS was arrested and processed, his fingerprint card, along with other evidence allegedly seized from 9300 WOODWARD AVENUE, was taken to the Michigan State Scientific Laboratory to be analyzed for prints. The assignment of this evidence was given to Sgt. Nichols.

Sgt. Nichols extracted prints from two (2) objects and placed them on "lifts". As routine of the office, after he made his examination and findings, he submitted the lifts to Sgt. Mowery, a fellow worker, to see if Mowery could verify his findings. Sgt. Mowery never questioned Sgt. Nichols about the origin of the prints, nor ever saw from whence they were extracted. The case file was thereafter placed in the office file cabinet by someone.

Some five (5) months later, Sgt. Nichols was killed in a plane crash and was not available to testify at trial. Over vehement objections of defense counsel, the district court allowed Sgt. Mowery to testify from notes compiled by the deceased, Sgt. Nichols, and received as exhibits, the sixteen pieces of tinfoil strips and the two "lifts" with prints from the case file. However, the court did not receive the file as a business record. Also, the court did not receive as evidence the report of Sgt. Nichols' findings.

It was disclosed during the testimony that six (6) months before trial, some unidentified person had picked up the laboratory file and the whereabouts of said file was not accounted for from that time to the date of the trial. Moreover, no record custodian was brought in to testify as to the accuracy of the file or the manner in which it had been kept from the date of compilation.

Defense motion for Directed Verdict at the conclusion of the government's proofs was denied. Defendants offered no proofs. The court found Defendant, Alice Jones, not guity. The court found Defendant MELVIN LEMMONS guilty. A subsequent Motion for Judgment of Acquittal Notwithstanding the Verdict or New Trial was denied. The Court of Appeals affirmed the decisions of the District Court.[1]

Petition for rehearing with suggestion of the appropriateness of rehearing en banc was denied February 13, 1976.

This court extended the time within which a petition for certiorari may be filed to April 13, 1976.

REASONS FOR GRANTING WRIT

I.

Police officials may not discriminatorily make selective arrests of citizens, without probable cause, who merely have a proprietary interest in property where contraband is found. The Court of Appeals' decision to the contrary is clearly erroneous.

In the instant case, Federal Agents working in conjunction with an alleged informant, had a clothing store under surveillance for about one month. During the month, the informant is said to have spoken with a *female* inside the store, known to him as Carol Jones, on two (2) occasions, first on December 15, 1973 and again on January 15, 1974. On each of the occasions, the informant allegedly saw what he believed to be narcotics, in the possession of the female known to him as Carol Jones. The business was a duly registered Michigan Corporation.

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[1] The Opinion and Order of the Court of Appeals may be found in the appendix.

During the one month period, the agents conducted surveillance of the business some 12-13 times, but observed nothing unusual for that type of business that would corroborate the information they were receiving from the informant, such as, known drug dealers or addicts frequenting the store. Moreover, although they were making observations on the two dates the informant allegedly saw narcotics on the premises, they did not see him enter or exit the store, nor was the informant himself searched in advance.

Seven days after the informant allegedly saw Carol Jones in possession of drugs inside the store, agents, armed with a search warrant obtained six days before, conducted a raid of the business. While they were searching the premises, Petitioner LEMMONS was contacted at his home and appeared at the store to inquire of the nature of the trouble, and expressed that he was a corporate officer.

LEMMONS was immediately placed under arrest, strip searched, and his vehicle parked outside was likewise searched. Nothing illegal was found on his person or in his vehicle.

It is undisputed that prior to his appearance at the store, and introduction of himself, the agents were never cognizant of LEMMONS' existence.[2] Moreover, his name was never prevalent in the investigation.

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[2] Testimony of S/A Bauer at Evidentiary Hearing App. 131-132:

Q. Now, had you ever seen Mr. Lemmons prior to that time?
A. I have no recollection of ever seeing him prior to that date.
Q. Had you ever seen him either in the store or going in the store at any time prior to that day?
A. Not to my recollection.
Q. So, it would be fair to say that you were not cognizant of the person of Mr. Lemmons prior to the 22nd of January, 1973?
A. That is correct.

The Sixth Circuit Court of Appeals held that, the foregoing facts were sufficient probable cause to arrest Petitioner LEMMONS as a possessor of the narcotics found on the premises.[3] The Court said:

> "Although we *regard the probable cause issue in this case as a close one,* we hold that the officer had sufficient information to afford him probable cause to believe that Lemmons possessed the narcotics found in the file cabinet . . .
>
> "In so holding, *we do not give blanket approval to the indiscriminate arrest of store proprietors solely because contraband is discovered on the premises.*" (Emphasis added)

The Court of Appeals' use of *Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1949), as supportive authority for the finding of probable cause to arrest the Petitioner LEMMONS in the instant case is clearly misplaced.

The Appellate Court first overlooks the fact that LEMMONS was placed under arrest upon entering the store, some ten (10) minutes before any narcotics were found. Accordingly, the finding of narcotics was not significant to his arrest. After he was arrested and strip searched, he was confined to a restricted area and was not free to leave.

Second, in *Brinegar,* supra, the police were aware of the defendant's existence and involvement in illegal activity, having arrested him five months before transporting liquor, had twice seen the defendant loading liquor near

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Testimony of Sgt. Ivan Teshka App. 149:

Q. Did you know Mr. Lemmons prior to the 22nd of January?
A. No sir, I did not.
Q. Had you ever seen him prior to that time?
A. No sir, I did not.

[3] See the Opinion of the Court in the Appendix at p. 12a.

the Oklahoma line, knew the defendant's reputation for hauling liquor and observed the defendant driving a heavily loaded vehicle in Oklahoma, near the Missouri line.

In the instant case, the agents were not cognizant of Petitioner LEMMONS' existence or that he was in any way involved in any illegal activity. Moreover, he was never present during any surveillances, nor holds a position that required him to be present at any particular time. The entire investigation was based upon the informant's dealings with a *female* known to him as Carol Jones.

It is abundantly clear that at the time the agents arrested LEMMONS, upon his entry to the store, or even after narcotics was found on the premises, there was no probable cause to support such arrest without a warrant. Accordingly, the holding of the Sixth Circuit Court of Appeals to the contrary, the instant case is clearly in conflict with the decisions of this court, which have consistently held for many decades that probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed, and that the person arrested committed the offense. *Brinegar* v. *U.S.,* 338 U.S. 160, 175, 176 (1949); *Beck* v. *Ohio,* 379 U.S. 83, 13 L. Ed.2d 142, 85 S. Ct. 1223; *Whiteley* v. *Warden,* 401 U.S. 560, 28 L.Ed.2d 306, 91 S. Ct. 1031.

In the instant case, there was no reason to believe that the Petitioner LEMMONS ever possessed any narcotics. Moreover, at the time of his arrest, there was no knowledge that anyone possessed drugs. Accordingly, any evidence uncovered as a result of his illegal arrest would be inadmissible. *Wong Sun* v. *United States,* 371 U.S. 471, 9 L. Ed.2d 441, 83 S. Ct. 407.

We submit that the decision of the Court of Appeals, in this case, is of major significance to national jurisprudence and should be reviewed by this Honorable Court because said decision stands for the proposition that police may make discriminate and selective arrests of citizens on a mere proprietary interest in property where contraband is found, wherein probable cause to arrest said person does not otherwise exist.

The danger of such a decision is manifold. Many innocent property owners are certain to suffer the wrath of this unfortunate decision, simply because they own property. Moreover, this kind of decision opens the floodgates of harassment to police, the very evil that the Bill of Rights was designed to protect against.

In its opinion (App. 12a), the Court of Appeals says, in effect, we are holding that this is sufficient for probable cause *in this case,* but we are not giving blanket approval to *indiscriminate* arrests of store proprietors solely because contraband is discovered on their premises. This attempt, on the part of the court, to qualify its decision in the instant case, begs the question of, where is the line to be drawn? What criteria must police in the street use in making *discriminate* arrests? Can the law of this decision be applied *equally* to every citizen? Obviously not, if the court's decision means anything.

Certainly, the decision of the Court of Appeals, from a literal reading and interpretation, is not reconcilable with the overwhelming weight of authority and needs further clarification, if nothing else. We submit that reversal is imperative and certainly warranted.

II.

The district court may not foreclose legitimate pretrial discovery, which denies an accused's 6th Amendment right to the effective assistance of counsel on the defense proffered.

The defense proffered before the district court, in the instant case, was that the Petitioner LEMMONS was framed; that there was no informant as alleged; that if there was an informant, he or she would probably be one of the store employees with a probable reason to be a part of the scheme.

Defense counsel filed five (5) sets of discovery Motions with the court, setting forth the reasons why he felt that liberal discovery was necessary as a prerequisite to the presentation of an effective defense for Petitioner LEMMONS.

The district court abruptly denied every defense motion without seriously entertaining legal arguments. The Court of Appeals dismissed this assignment of error as being without merit and requiring no detailed discussion (Opinion, App. 22a). This, we assert, is clear error and in conflict with established precedent. *McCray* v. *Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L.Ed.2d 62 (1967); *United States* v. *Jackson*, 384 F.2d 825 (3d Cir. 1967); *United States* v. *Day*, 384 F.2d 464, 470 (3d Cir. 1967); Rule 510 (c) Federal Rules of Evidence Annotated.

Of most damaging impact to the defense was the trial court's abrupt refusal to even seriously consider presented facts in request for disclosure of the informer, or himself conduct a confidential in camera conference with the informer. The court simply concluded that "the informant is not going to be disclosed and I am not going to interview him." No further argument on the issue was allowed.

While we recognize the importance of the public interest in the use of informants, in the war on crime, courts must objectively consider whether said asserted privilege of nondisclosure is outweighed by an accused's right to a fair trial, and preparation of an effective defense. *Roviaro* v. *United States*, 353 U.S. 53, 60, 77 S. Ct. 623, 1 L.Ed.2d 639 (1957); *United States* v. *Day*, 384 F.2d 464, 470 (3d Cir. 1967); Rule 510 (c) Federal Rules of Evidence, Appendix, P. 266, which had practical effect at the time of the instant trial, but had not been adopted by Congress.

The facts of the instant case, before and at the time of arrest, were dubious, to say the least. For example,

1. Why would the agents be preparing to seek a search warrant to raid a business place *before* they have *any* knowledge of wrongdoings there? The agents had prepared to seek a search warrant prior to December 15, 1972 and a picture they had taken of the building December 14, 1972 was discovered by defense counsel. Yet, the first information they received from the informer, concerning the business, and they had no other, was December 15, 1972. It is certainly possible that the defense could develop facts to show that the informer was part of a scheme against the business for his own benefit. Moreover, he was never searched before entering the premises, and was probably instrumental in the agents waiting seven (7) days before executing the search warrant.

2. Undisputed proofs showed that the business was closed December 15, 1972 while moving to a different location. Moreover, the agents did not see the informer enter or exit the premises at any time.

3. Why would an informer, involved with a narcotic investigation, wait exactly one month (December

15, 1972 to January 15, 1973) to return to a place where he was securing drugs?

4. Is it likely that the informant could go into a business place, occupied by six (6) employees, and obtain narcotics from someone, whose name he does not know, without money? (See Search Warrant Affidavit).

5. Due to the transitory nature of drug transactions, is it feasible that agents would wait seven (7) days to find drugs that the informer saw at a place, without updated information to warrant the delay? Moreover, how could the agents be so sure they would find drugs, after the delay, that they would carry a briefcase containing manilla envelopes and plastic bags, before anything was found?

6. What happened to the narcotic paraphernalia that was allegedly confiscated?

7. Why would the agents refuse to inventory their find in the presence of appellant and his attorney, since both were present on the premises, as is required by Rule 51 (d) Federal Rules of Criminal Procedure? Why was the return falsified?

8. Why was there a difference in the color of the powder allegedly seized from the premises from that produced at trial? Also, why was there a difference in the strength and adulterants used, if all came from the same batch?

The foregoing were just a fraction of the many areas of defense inquiry submitted to the trial court to support our contention that as a minimum, the court should conduct an in camera conference of the informant and seal the results thereof for review by the Appellate Courts.

From the outset, possession in this case was constructive and not actual. Moreover, the Petitioner LEMMONS was never seen on the premises during a month investigation

and was not there at the commencement of the search warrant execution. In most of the cases considered by this court, possession has been actual, and the ultimate issue would be, whether the interest society has in privileged communications with informants outweighed the constitutional right of an accused to attempt to discolor the truth; i.e., the fact of possession, being beyond question, having been seen or found in the possession of the accused. *McCray* v. *Illinois,* supra; *Roviaro* v. *United States,* supra.

Such is not the issue here, but rather, whether sufficient circumstantial facts were adduced to support a conclusion that LEMMONS was in constructive possession of the narcotics seized, beyond a reasonable doubt. Certainly, the informant's testimony would have to be favorable to the defense on that issue, because it is clear from the agent's testimony that, neither the informant nor they were ever cognizant of LEMMONS' existence.

Moreover, it is reasonably possible that the informant's conversation with the female he dealt with may evidence sole possession in her and no other person. Accordingly, knowledge of the informant's total information, in connection with the investigation was essential to defense preparation.

Then, the court should always be mindful of the possibility that the informer himself may be the real possessor. *Roviaro* v. *United States,* supra.

The place of possession, in the instant case, was not a private home or private office, but rather, a business place wholly accessible to the public without restrictions[4] and certainly accessible to all six (6) employees.

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[4] Testimony of Officer Condo, Tr. 40; App. 125:

Q. Now, when you first refer to the question of accessibility, if we assume that this bath — was a public bathroom for cus-

Assuming arguendo that, the informer is a disgruntled employee, or a person seeking vengeance, or who has to produce for the government for his own aggrandizement, couldn't he or she be the real possessor? Especially in light of the fact that, no independent verification was made of the informant's freedom of possession prior to entry. The laboratory report revealed that there were identifiable fingerprints on the contraband containers that were not identified. Suppose these were the informer's prints? What plausible answer could be given for these prints, other than the informer was as much a possessor as anyone else charged?

All of the foregoing were proper areas of defense inquiry, which were flatly cut off by the court's denial of all discovery motions. Moreover, without the cooperation of the government and the court, defense could not pursue these areas of investigation.

Finally, how could anyone be prejudiced, other than the defense, by the court conducting an in camera hearing with the informer, as requested by the defense? This question is appropriately answered by the Advisory Committee's notes to Rule 510 (c) Federal Rules of Evidence, saying:

> "A hearing in camera provides an accommodation of these conflicting interests. *United States* v. *Jackson,* 384 F.2d 825 (3d Cir. 1967). The limited disclosure

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tomers and employees and that merchandise was all in this area of this dressing room, would it not be fair also to assume that the desk and the file cabinet would be accessible to anyone who went into the area of the building?

A. The desk and the file drawers are accessible to anyone who would go in that part of the building.

Q. You didn't have any trouble reaching it, you didn't have to go through any partitions or anything like that?

A. No.

> to the judge avoids any significant impairment of the secrecy, while affording the accused a substantial measure of protection against arbitrary police action. The procedure is consistent with McCray and the decisions there discussed."

We submit that a review by this court of the lower court's decisions on this issue is warranted.

III.

The district court sitting as a trier of the fact, at trial, may not include in his deliberations of an accused's guilt or innocence, evidence adduced at pretrial hearings.

In the instant cause, the trial judge opined that the evidence he heard at the evidentiary hearing and trial, persuaded him, beyond a reasonable doubt, of the Defendant LEMMONS' guilt of the charges imposed.

In disposing of the defense motion for judgment of acquittal or new trial, the trial judge made the following observation (See App. 234):

> THE COURT: "Gentlemen, this case has taken a considerable amount of time. I had an evidentiary on this that lasted perhaps a week, did it not or close to that.
>
> MR. RICE: "Two afternoons.
>
> THE COURT: "Two afternoons. During that period we heard maybe seven or eight witnesses, the court did at that time, maybe not that many, I don't remember.
>
> "The court heard this case without a jury and found Alice Jones, also known as Carol Jones, not guilty because the court did not feel at that time – and it

still does not feel — that the Government proved its case beyond a reasonable doubt as it related to her.

"Now, as to Melvin Lemmons, the court did feel and still is of the same view that the Government did prove its case beyond a reasonable doubt as it relates to Melvin Lemmons and will deny the defendant Lemmons' Motion for judgment of acquittal or new trial."

The Court of Appeals opined that, "On the basis of Sgt. Mowery's testimony that appellant's prints were *found* on the foil packets, the district judge found Lemmons guilty of the offense charged." Said decision is clearly erroneous for two reasons.

In the foregoing excerpt of the trial judge's opinion, he expressed the basis upon which his finding of guilt rested, viz-a-viz, the facts presented at the evidentiary hearing and trial. The law is abundantly clear that the trier of the fact of guilt or innocence at trial may not traverse the perimeter of the trial record in his deliberations of those questions.

Secondly, the trial record is completely barren of any reference as to the origin of the fingerprints used by the laboratory technician to compare the unknown prints with the known. Sgt. Mowery, of the State Police Crime Lab, testified that he was approached by Sgt. Nichols to verify his (Nichols') findings, which was a common practice of their office. When he (Mowery) first saw the unknown prints, they had already been extracted from some source by Sgt. Nichols and placed on lifts. He (Mowery) had no personal knowledge of the origin. Moreover, Mowery first saw the tinfoil strips in court, during trial. (Tr. 150, App. 143-144; Tr. 247, App. 153).

Obviously, the Court of Appeals has employed the use of a crucial non-existent fact, i.e., Petitioner's fingerprints

were *found* on the tinfoil packets, in upholding a clearly erroneous conviction.

Moreover, the Court of Appeals failed to follow or discuss its prior decision concerning the same issue. *Collon* v. *United States,* 426 F.2d 939 (6th Cir. 1970). In *Collon,* supra, the Court of Appeals held that the general description of the defendant plus his finger and palm prints on a map found in the get-away car, immediately after the robbery, which had the location of the robbery marked thereon, was not sufficient evidence to overcome a Motion for Acquittal at p. 942. See also, *Hiet* v. *United States,* 124 U.S. App. D.C. 313, 365 F.2d 504 (1966); *Borum* v. *United States,* 127 App. D.C. 48, 380 F.2d 595 (1967); *State* v. *Mayell,* 163 Conn. 419, 311 A.2d 60 (1972).

In the instant case, the Court of Appeals concedes at page 3 of the Opinion (App. 17a) that, the only evidence inculpating Petitioner LEMMONS to the offense charged were fingerprints alleged to be attributable to him.[5]

Just as in the *Collon* case, the witness testified that he could not say when the imprints were made on whatever they were extracted from.[6] Moreover, in the instant case, there was no clear proofs that LEMMONS' prints were on

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[5] As we have previously pointed out, the Appellate Court's reference to Petitioner Lemmons' prints being found on the tinfoil packets is not supported by any admissible evidence adduced at trial.

[6] Testimony of Sgt. Mowery, Tr. 268-269, App. 162-163:

Q. Now can you by looking at the lifts that you have examined tell me when they were imprinted on whatever object they were extracted from?

A. No sir.

Q. So, it is possible that the imprint on whatever object those lifts had been placed on, the imprint in fact could have been placed on there a year, two years, or even more, longer than that, prior to the lift being removed; is that possible?

A. Yes sir.

any of the tinfoil containers, and if so, which ones. Further, there were other prints present.

The instant case was more egregious for the reasoning employed in the court's decision in the *Collon* case than that case itself. Accordingly, it is impossible to reconcile the court's decision in this case.

For the reasons herein stated, we submit that this Honorable Court should review the decision of the Court of Appeals for the Sixth Circuit and accord this Petitioner an equal measure of the law.

IV.

The Sixth Amendment guarantee of confrontation and cross examination outweighs the right of the government to present evidence from business records concerning facts that are outcome determinative.

The significant facts on this issue are that, after petitioner's arrest, without a warrant, his fingerprints were taken in processing and submitted to the Michigan State Police Lab for comparison with any prints that might be extracted from the narcotic containers.

The lab technician extracted two latent prints from something and placed them on lifts. He compared the known prints of the defendant with the unknown prints on the lifts and concluded that the prints on the lifts were attributable to Petitioner LEMMONS.

As part of their office procedure, the prints on the lifts and the known prints of the Petitioner LEMMONS were submitted to another lab technician, Sgt. Merlin Mowery, for verification. Mowery verified the findings, but there was no discussion between the two as to the origin of the

unknown latent prints, nor did Mowery ever see the source of their extraction. Mowery made no independent notes of his own.

In the interim, before trial, the examining lab technician, Sgt. Nichols, died.

Six (6) months before trial, someone named Pelski picked up the lab file and its whereabouts were unaccounted for until the date of trial (Tr. 248, App. 153).

Mowery had never seen the evidence envelope and was unaware that an inner sealed envelope had been opened by someone, before being brought to court (Tr. 252).

Over vehement objections of defense counsel, the trial court permitted the government to remove from the laboratory file, the tinfoil strips, the lifts and allowed the witness Mowery to testify that he agreed with the findings of the deceased lab technician; that the prints on the lifts (unknown latent) and the known prints on the Petitioner LEMMONS' arrest card were attributable to LEMMONS. The remainder of the lab file was never seen by the defense nor received as evidence.

The constitutional right of every accused to confront and cross examine witnesses against him should never be weighed by the courts lightly. *Barber* v. *Page,* 390 U.S. 719; *Bruton* v. *United States,* 391 U.S. 123. And even more so in cases where the right to confrontation and cross examination involves evidence that is outcome determina- *Phillips* v. *Neil,* 452 F.2d 1228 (6th Cir. 1973). We are unable to reconcile the court's decision, in the instant case, with the two cases cited as supportive authority. Clearly, both support our argument.

Moreover, the Appellate Court's reasoning as to the efficacy and applicability of the business records excep-

tion to the hearsay rule, in this case, was greatly misplaced for several reasons.

First, there was no record custodian testimony, to the effect that the record was kept in the ordinary course of business, and testimony of said custodian authenticating the accuracy of the records and explaining efforts employed to ensure accuracy. [See *United States* v. *Blake,* 488 F.2d 101 (5th Cir., 1973), holding the foregoing are two to the admissibility of business records].

Second, the trial court *never* received the lab file in evidence as a business record; but rather, received as evidence two items, the tinfoils and print lifts, from the file. Accordingly, the business records exception could not be applicable to this case. The trial judge could not consider, in his deliberations, exhibits not received as evidence. *United States* v. *Lewis,* 435 F.2d 417; 79 Harv. L. Rev. 407 (1965).

Third, had the business record been received as evidence, the defense would have had the right to fully examine the record and the contents thereof. Moreover, the defense could have demanded the right to have its independent expert examine the significant contents of the file.

Fourth, the government never offered the lab file as a business record exception, nor the report of the lab technician as to his findings.

Finally, the defense could not effectively cross examine the witness Mowery concerning the only critical evidence against him, because each time the cross examination was directed to significant specifics, the witness would relieve himself by answering that he lacked personal knowledge or was simply verifying another person's work.

Justice should not be a game of throwing a rock and hiding your hand.

CONCLUSION

A sense of justice and concern for the uniformity of our national jurisprudence compels this Honorable Court to grant Certiorari in this cause.

Respectfully submitted,

/s/ WILFRED C. RICE
WILFRED C. RICE
Attorney for Petitioner
2436 Guardian Building
Detroit, Michigan 48226
(313) 965-7962

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

Magistrate's Docket No. ——

UNITED STATES OF AMERICA

vs.

9330 Woodward Avenue, Detroit, Michigan

AFFIDAVIT FOR SEARCH WARRANT

BEFORE Hon. Paul J. Komives, Detroit, Michigan

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 9300 Woodward Avenue, Detroit, Michigan; being the "Imported Fashions of Tomorrow", the first floor and basement area being designated by the number 9300 above the doorway, said premises being in a yellow brick, 2-story building on the northeast corner of Woodward and Leicester; in the Eastern District of Michigan there is now being concealed certain property, namely heroin and other evidence of dealing in narcotic drugs, which are being possessed with intent to distribute, in violation of Title 21, Section 841 (a) (1), United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

On January 15, 1973, an informant stated to affiant that the informant was in the premises to be searched on that date and on that occasion the occupant of the premises delivered a quantity of heroin to the informant, which was later tested and determined to be heroin, and the occupant then stated that there was an additional quantity of heroin in the premises for sale to other persons. The informant was previously in the premises on or about December 15, 1972, and then informed the affiant that the occupant was observed selling a quantity of white powder which was represented by the occupant to be heroin. The informant has provided affiant with information concerning criminal activity on more than 2 occasions prior to December 15, 1972, which information was in each instance been verified as being correct.

RONALD DePOTTEY
Special Agent – BNDD

Sworn to before me, and subscribed in my presence, January 16, 1973.

.....
United States Commissioner

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

Magistrate's Docket No. ——

UNITED STATES OF AMERICA

vs.

9330 Woodward Avenue, Detroit, Michigan

SEARCH WARRANT

To Special Agent Ronald DePottey, Bureau of Narcotics and Dangerous Drugs, and any other agent authorized to execute search warrants:

Affidavit having been made before me by Special Agent DePottey that he has reason to believe that on the premises known as 9300 Woodward Avenue, Detroit, Michigan; being the "Imported Fashions of Tomorrow," the first floor and basement area being designated by the number 9300 above the doorway, said premises being in a yellow brick, 2-story building on the northeast corner of Woodward and Leicester; in the Eastern District of Michigan there is now being concealed certain property, namely heroin and other evidence of dealing in narcotic drugs, which are being possessed with intent to distribute, in violation of Title 21, Section 841 (a) (1), United States Code; and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the

premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night[1] and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 16th day of January, 1973.

.....

U. S. Magistrate.

RETURN

I received the attached search warrant 1/16, 1973, and have executed it as follows:

On 1-22, 1973 at 3:00 o'clock P.M., I searched the premises described in the warrant and

I left a copy of the warrant at the place of search together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1. White Powder in Tin Foil Packets.
2. Misc. Narc. Paraphernalia.
3. Three Loaded Handguns. One Loaded Shotgun.
4. Misc. Papers.

/s/ IRS AGENT WILLIAMS

[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

This inventory was made in the presence of S/A Edward Bauer, Trooper W. Trap and D/Sgt. I. Selick.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Trooper Ivan Teshlic

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

Magistrate's Docket No. ——

UNITED STATES OF AMERICA

vs.

MELVIN LEMMONS; ALICE JONES

INDICTMENT NO. 48560
Vio: Title 21, Section 841(a) (1), U.S.C.

INDICTMENT

(Filed April 4, 1973)

THE GRAND JURY CHARGES:

COUNT ONE

That on or about January 22, 1973, in the Eastern District of Michigan, Southern Division, MELVIN LEM-

MONS and ALICE JONES, a/k/a Carol Jones, defendants herein, did knowingly and unlawfully possess with intent to distribute approximately 118.5 grams of heroin, a Schedule I Narcotic Drug Controlled Substance; in violation of Title 21, Section 841 (a) (1), United States Code.

A TRUE BILL.

.....
Foreman

RALPH B. GUY, JR.
United States Attorney

WILLIAM C. IBERSHOF
Assistant United States Attorney

Dated: April 4, 1973

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

Magistrate's Docket No. ——

UNITED STATE OF AMERICA

vs.

MELVIN LEMMONS; ALICE JONES

ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS EVIDENCE, TO ALLOW DISCOVERY AND FOR DISCLOSURE OF INFORMANT

(Filed November 21, 1973)

At a session of said Court held in the Federal Building, Detroit, Michigan on the 5th day of November, 1973.

PRESENT: Honorable Damon J. Keith
United States District Judge

A Motion to Suppress Evidence, to Allow Discovery, and for Disclosure of Informant having been filed on behalf of the defendants MELVIN LEMMONS, ALICE JONES, and a hearing having been held, at which time testimony was taken, and after hearing the testimony and arguments of counsel, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Motion to Suppress Evidence, to Allow Discovery, and for Disclosure of Informant filed on behalf of the defendants MELVIN LEMMONS, ALICE JONES, be and hereby is denied.

/s/ DAMON J. KEITH
United States District Judge.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

Magistrate's Docket No. ——

UNITED STATE OF AMERICA

vs.

MELVIN LEMMONS; ALICE JONES

ORDER DENYING DEFENDANTS' MOTION FOR REHEARING OF MOTION TO SUPPRESS EVIDENCE, TO ALLOW DISCOVERY AND FOR DISCLOSURE OF INFORMANT

(Filed November 23, 1973)

At a session of said Court, held in the Federal Building, Detroit, Michigan, on the 29th day of November, 1973;

PRESENT: Honorable DAMON J. KEITH, District Judge.

This matter having been presenting [sic] to the Court by defendants' motion and brief, and the Court being duly advised in the premises,

IT IS ORDERED that the Motion for Rehearing be, and the same hereby is, denied.

/s/ DAMON J. KEITH
District Judge

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

Magistrate's Docket No. ——

UNITED STATE OF AMERICA

vs.

MELVIN LEMMONS; ALICE JONES

MEMORANDUM OPINION AND ORDER

(Filed January 24, 1974)

In this action each defendant has been indicted for possession of heroin in violation of Title 21, Section 841 (a) (1), United States Code. This opinion is in response to various motions that were filed by defendants.

Both defendants have moved for inspection and scientific and chemical analysis of all tangible evidence to be presented by the government in this cause. After reviewing the law and the briefs of the parties, the Court concludes that the defendants' motion should be granted. The Court, however, rules that defendants may inspect the tangible evidence only within the limits of Rule 16(b) of the Federal Rules of Criminal Procedure. The Court further rules that the examination requested be concluded by recognized experts, that any chemical analysis of narcotics be conducted by a laboratory authorized by law to handle controlled substances and that the narcotics in question be analyzed under the supervision and observation of a representative of the Drug Enforcement Administration.

Defendants have also moved to discover the government's prospective witness before trial. After reviewing the law and the facts in this case, the Court, hereby denies this request. Defendants have not given sufficient justification for requiring such discovery. *U.S.* v. *Barnett,* 418 F. 2d 309 (6th Cir. 1969). *U.S.* v. *Conder,* 423 F. 2d 904 (6th Cir. 1970) cert. denied 400 U.S. 958.

Defendants have requested a copy of the Grand Jury transcript prior to trial, for use at the trial. The Court is of the opinion that the production of the transcript prior to trial would be improper in this case. If defendants show a particularized need for the transcript for purposes of impeaching a government witness who has testified at trial, defendants, upon a proper motion at that time should have access to the requested transcript (if the transcript exists). *Bradley* v. *U. S.,* 420 F. 2d 181 (D.C. Cir. 1969); *U. S.* v. *Johnson,* 414 F. 2d 22 (6th Cir. 1969). To allow discovery of such a transcript now would allow defendants discovery of the government's witnesses contrary to the ruling of this Court.

Defendants have further moved to dismiss the indictment on the grounds that they have been denied a speedy trial. In support of their motion they point out that their defense has been prejudiced because Eva Hughes died several months after defendants were arrested. Defendants claim that Eva Hughs was an eye-witness and would testify favorably in their defense.

The leading authority regarding the speedy trial issue is *Barker* v. *Wingo,* 407 U.S. 514 (1971). In establishing guidelines for determining when a defendant has been denied his right to a speedy trial, the Court stated that:

> The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. . . . A balancing test necessarily compels

> courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. 407 U.S. at 530.

The Court further noted that:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. *Id.* at 533.

Based on the facts in the present case and the law as stated above, the Court is of the opinion that defendants have not been denied a speedy trial. The record does not show that the government purposely delayed the trial, that defendants have demanded a trial, nor that defendants have been unduly prejudiced in preparing their defense. The death of Eva Hughes may have been a setback, but the record when viewed in its entirety does not indicate that defendants cannot receive a fair trial. *Barker* v. *Wingo, supra; United States* v. *Marion,* 404 U.S. 307 (1971).

Defendant, Melvin Lemmons, has moved to suppress certain fingerprint evidence as it relates to him. Defendant Lemmons has pleaded the "derivative evidence rule" in support of his motion. Defendant Lemmons claims (1) a packet of contraband (narcotics) was found in a certain building; (2) that the building where the packet was found was later established to be owned by Mr. Lemmons, (an owner of a corporation leasing the premises); (3) that

defendant Lemmons was arrested after his ownership was established; (4) that the packet of contraband was determined to be defendant Lemmons' only after the Government compared the fingerprints on Mr. Lemmons' arrest card with the fingerprints on the container of contraband; (5) that the fingerprint evidence is "derivative" of the illegal arrest because there was no probable cause to arrest defendant Lemmons; (6) and that the fingerprint evidence should be suppressed. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Defendant Lemmons also contends that "the presence of his fingerprints on the container without other supportive facts and circumstances will not support a conviction for possession."

Based on the record in this case (which includes evidence obtained at an evidentiary hearing), the Court is of the opinion that there was probable cause to arrest defendant Lemmons, hence, the arrest was legal and the fingerprints taken from the arrest card were not derivative of an illegal arrest.

The Court finds that there was probable cause to arrest Mr. Lemmons because the record indicates that the search warrant (which was based on information provided by a reliable informant) was valid; that the government in executing the search warrant discovered narcotic drugs, hand guns and other evidence that narcotics were being sold from a certain business premises (9300 Woodward Ave., Detroit, Michigan); that the narcotics were not in an area open to the public, but rather in a desk used in the conduct of the business; and that defendant Lemmons owned the building searched and operated the business in the beforementioned premises.

The Court also finds as premature defendant Lemmons' claim that the presence of his fingerprints on the container,

alone, will not support a conviction. The trier of fact at trial will make this determination.

In view of the above, the Court hereby grants defendants' motion for inspection and scientific and chemical analysis, but denies defendants' other motions.

IT IS SO ORDERED.

/s/ DAMON J. KEITH
U. S. DISTRICT JUDGE

DATED: January 24th, 1974.

UNITED STATE DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN –
SOUTHERN DIVISION

Magistrate's Docket No. ——

UNITED STATE OF AMERICA

vs.

MELVIN LEMMONS; ALICE JONES

TRIAL AND FINDING OF THE COURT

(Filed February 28, 1974)

At a session of said Court held in the Federal Building, City of Detroit, County of Wayne, Michigan, on the 28th day of February, 1974.

PRESENT: Honorable Damon J. Keith
United States District Judge

This matter having come on for trial without a jury; the government being represented by Mr. Richard Delonis, Assistant United States Attorney; the defendants being present in Court and being represented by Mr. Wilfred C. Rice, Attorney at Law, and the Court having heard statements of counsel, proofs and testimony of witnesses, arguments of counsel, and being fully advised in the premises, the Court does find and adjudge the defendant, Melvin Lemmons, GUILTY of the charge contained in the indictment and the defendant, Alice Jones a/k/a Carol Jones, NOT GUILTY of the charge contained in the indictment heretofore filed against them.

WHEREUPON the sentence of defendant, Melvin Lemmons is deferred, and the matter referred to the United States Probation Officer for investigation and report, and defendant Lemmons be remanded to the custody of the United States Marshal.

IT IS FURTHER ADJUDGED that the bond of defendant Alice Jones a/k/a Carol Jones is hereby dismissed.

Examined, approved, and ordered entered.

/s/ DAMON J. KEITH
United States District Judge

No. 74-1874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MELVIN LEMMONS, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed December 24, 1975.

Before: WEICK and MCCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

MCCREE, Circuit Judge. This is an appeal from conviction in a nonjury trial under a one-count indictment charging appellant with unlawful possession and intent to distribute 118.5 grams of heroin. 21 U.S.C. § 841 (a) (1).[1] We affirm.

The relevant facts are as follows. On January 16, 1973, Special Agent DePottey obtained a warrant for the search of a store building occupied by a retail clothing business known as "Imported Fashions of Tomorrow" located at

[1] 21 U.S.C. § 841(a)(1) provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person to knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

9300 Woodward Avenue, Detroit, Michigan. Agent DePottey returned to his office with the warrant and placed it in a file. The next day DePottey was placed on extended limited duty status for medical reasons and was restricted to office activities. Sgt. Teshka of the Michigan State Police executed the warrant at about 3 p.m. on January 22, 1973, five days after the warrant was issued.

The search warrant authorized a search of the first floor and basement area of the store that was "designated by the number 9300 above the doorway." Before the search commenced, Sergeant Teshka showed a copy of the search warrant to Alice Jones who identified herself to him as the person in charge of the store.

Shortly after the search was started, one of the officers discovered 16 packets of heroin in a file cabinet in an office area located at the rear of the store. Miss Jones was shown the packets and was shown where they were found. Within a few minutes, Mr. Lemmons arrived at the store. He identified himself as one of the owners of the business and told one of the officers that he felt he "had a right to see some papers that gave [the officers] permission to be on the premises." After the store had been thoroughly searched, both Miss Jones and Mr. Lemmons were placed under arrest and Lemmons' fingerprints were taken.

A one-count indictment was returned on April 4 charging appellant and Miss Jones with violation of 21 U.S.C. § 841 (a) (1). On October 30, the district court conducted an evidentiary hearing on motions for a bill of particulars, for disclosure of the identity of an informant, and for suppression of evidence. On January 24, 1974, the district court denied the motions.

A trial to the court without a jury commenced on February 26, 1974. At trial, Sgt. Mowery, a latent print specialist employed by the Michigan State Police, testified that fingerprints found on 2 of the 16 foil packets were attributable to Lemmons. The initial fingerprint analysis had been performed by Sgt. Nichols at the Michigan State Police Laboratory, but he died before trial. Accordingly, Sgt. Mowery, who had verified Nichols' findings at the laboratory, gave the testimony inculpating Lemmons. On the basis of Sgt. Mowery's testimony that appellant's prints were found on the foil packets, the district judge found Lemmons guilty of the offense charged.

On appeal we identify three issues that require discussion: (1) whether the five day delay in the execution of the warrant invalidated the search and required suppression of the foil packets containing the heroin; (2) whether probable cause existed for Lemmons' arrest, at which time his fingerprints were obtained; and (3) whether Sgt. Mowery's testimony about the fingerprint identification was admissible.

In *United States* v. *Wilson*, 491 F.2d 724 (6th Cir. 1974), we considered whether a six day delay in the execution of a search warrant required suppression of the evidence obtained. After reviewing the cases, we said that the better reasoned rule "allowed some delay where the cause or causes of the delay could appropriately be held to be 'reasonable' ". 491 F.2d at 725. In *Wilson* we determined that since the informant had purchased drugs on the day the warrant was issued and the Government wanted to conceal the identity of the informant, the delay in executing the warrant was reasonable. Although we do not condone a delay of the magnitude that occurred here, we determine that since the delay was caused by the ill health of DePottey, the agent in charge, it was reasonable. We also find that probable cause still existed for the search on January 22, 1973, because the warrant was executed within ten days as required by Fed. R. Crim. P. 41 (c), and because there

is nothing in the record to indicate that the circumstances related in the agent's affidavit affording probable cause for the issuance of the search warrant had changed before it was executed.

In determining that the officers had probable cause to arrest Lemmons, the district court relied upon the following circumstances:

> [T]he search warrant (which was based on information provided by a reliable informant) was valid; that the government in executing the search warrant discovered narcotic drugs, hand guns and other evidence that narcotics were being sold from a certain business premises (9300 Woodward Ave., Detroit, Michigan); that the narcotics were not in an area open to the public, but rather in a desk used in the conduct of the business; and that defendant Lemmons owned the building searched and operated the business in the beforementioned premises.

In *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949), the Supreme Court stated that probable cause to arrest existed where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Although we regard the probable cause issue in this case as a close one, we hold that the officer had sufficient information to afford him probable cause to believe that Lemmons possessed the narcotics found in the file cabinet. Lemmons' status as a part owner of the business combined with the fact that the narcotics were found in a filing cabinet in the office area of the store not accessible to the general public were sufficient to cause a reasonable person to have believed that Lemmons and Miss Jones, the store manager on duty at the time of

the search, were in control of the office area and possessed the drugs found there. *See, e.g., Johnson* v. *Wright*, 509 F.2d 828 (9th Cir. 1975), where the court held that it was proper to arrest three occupants of an automobile when the officer discovered a sawed-off shotgun in the vehicle. In so holding, we do not give blanket approval to the indiscriminate arrest of store proprietors solely because contraband is disocevered on the premises.

Appellant next contends that the government failed to prove the chain of custody of the foil packets and that the district court erroneously relied on the business records exception to the hearsay rule (as well as violating appellant's Sixth Amendment confrontation clause rights) in permitting Sgt. Mowery to testify to the similarity between appellant's fingerprints and those found on the foil packets.

In another criminal appeal, *United States* v. *Russo*, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974), we stated that:

> The Federal Business Records Act was adopted for the purpose of facilitating the admission of records into evidence where experience has shown them to be trustworthy. It should be liberally construed to avoid the difficulties of an archaic practice which formerly required every written document to be authenticated by the person who prepared it. [Citations omitted.] The Act should never be interpreted so strictly as to deprive the courts of the realities of business and professional practices. [Citations omitted.]

480 F.2d at 1240.

In this case Sgt. Mowery testified that standard laboratory procedure was followed by Sgt. Nichols who originally received the foil packets. Nichols obtained lifts from some of the packets, noted the origin of each of the lifts, determined that the prints were attributable to Lemmons,

and then, also following standard laboratory procedure, requested Sgt. Mowery to verify his opinion. Mowery testified at trial that it was his opinion that the latent prints found on the foil packets matched Lemmons' fingerprints. We hold that, under the circumstances, the business records exception to the hearsay rule, 28 U.S.C. § 1732, was properly relied upon by the district court for the purpose of admitting Mowery's testimony concerning the fingerprint evidence.

With respect to appellant's confrontation clause challenge to the admission of this testimony, we hold that because the trier of fact had a satisfactory basis in Mowery's testimony for evaluating the fingerprint evidence, there was no violation of appellant's rights guaranteed by the Sixth Amendment. *See Phillips* v. *Neil,* 452 F.2d 337, 346-47 (6th Cir. 1971), *cert. denied,* 409 U.S. 884 (1972). We find no merit to the chain of custody issue since the laboratory examination that established that Lemmons' fingerprints were on the foil packets had been concluded before the tinfoil and lifts were turned over to another officer who did not appear at the trial.

Appellant also contends that the search of the office area in the store was improper because the search warrant stated that the premises to be searched were located at 9300 Woodward Avenue and the drugs were found in an area of the store located at 9304 Woodward. The record reveals that the store occupied both the 9300 and 9304 addresses although there was only one public entrance which was located at 9300 Woodward. The 9304 entrance was blocked by a display cabinet. Originally, there were separate businesses in 9300 and 9304 and they were separated by a wall. However, at the time of the search, an archway had been opened between the two addresses and the store used both portions of the building for the

business. The search warrant also made it clear that the store "Imported Fashions of Tomorrow," including the basement and first floor area, were to be searched for drugs. In *United States* v. *Jordan,* 349 F.2d 107 (6th Cir. 1965), we upheld the search of the second floor of a two-story house over appellant's objection that the second floor was a separate living unit over which he had no control. We observed that appellant was the sole lessee listed on the rental agreement that the utilities for both floors were contracted for in appellant's name, that he acknowledged the premises to be his residence and that there was no external indication that the house might be divided into more than one living unit before the search was undertaken. As one court has pointed out: the Fourth Amendment "safeguard is designed to require a description which particularly points to a definitely ascertainable place so as to exclude others." *People* v. *Watson,* 26 Ill.2d 203, 186 N.E.2d 326 (1962). We hold that the warrant in this case was sufficiently definite to authorize a search of the entire store.

Appellant also contends that he was denied his constitutional right to a speedy trial. The indictment was returned against him on April 4, 1973, a motion to suppress was filed on April 26, an evidentiary hearing covering parts of four days commenced on October 30, the district court denied the motion for suppression and further motions for discovery in a written order on January 24, 1974, the trial was held on February 26, 27, and 28, 1974, and the district judge found appellant guilty at the conclusion of the trial. We agree with the district court's conclusion that: "The record does not show that the government purposely delayed the trial, that defendants have demanded a trial, nor that defendants have been unduly prejudiced in preparing their defense. The death of [a de-

fense witness] may have been a setback, but the record when viewed in its entirety does not indicate that defendants cannot receive a fair trial. *Barker* v. *Wingo* [407 U.S. 514 (1971)], *United States* v. *Marion*, 404 U.S. 307 (1971)."

Appellant argues several other issues: (1) whether the search warrant affidavit contained sufficient information to amount to probable cause, (2) whether correct procedure was followed when the search warrant inventory was given to appellant's attorney instead of to him, (3) whether the district court erred in denying appellant's motions for discovery, and (4) whether there is sufficient evidence to sustain the verdict. After careful consideration, we determine that the above issues are without merit and do not require detailed discussion.

Accordingly, the judgment of conviction is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 74-1874

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MELVIN LEMMONS,
Defendant-Appellant.

ORDER

(Filed February 13, 1976)

BEFORE: WEICK, and McCREE, Circuit Judges and CECIL, Senior Circuit Judge.

The petition for rehearing with suggestion for a rehearing en banc having come on to be heard, and no judge having requested a vote on the suggestion for en banc consideration, and the petition having therefore been referred to the panel that heard the case, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by order of the court.

/s/ JOHN P. HEHMAN
Clerk